(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR(CHHATTISGARH)

APPEAL UNDER SEC. 374(2) CR.P.C.

CR.APPEAL NO. 139 /2001.

APPELLANT (In custody) — Beko Payko aged 30 years son of Beko Kariyo, cultivator, resident of village Lalaguda Lalipara, P.S.Kodenar Distt.Bastar (Chhattisgarh)

VERSUS

RESPONDENT — State of Chhattisgarh Through: P.S.Kodenar Distt.Bastar.

FIRST APPEAL BEFORE THIS HON'BLE COURT.

(22)

HIGH COURT OF CHHATTISGARH : BILASPUR

CRIMINAL APPEAL NO. 139 OF 2001

Beko Payko

Vs.

State of Chhattisgarh

CORAM :-	HON'BLE SHRI FAKHRUDDIN, J & HON'BLE SHRI DHIRENDRA MISHRA, J
Present :-	Shri Suresh Pandey and Shri Chandra Shekhar Bajpai, counsel for the appellant. Shri U.N.S. Deo, Govt. Advocate /Addl. Public Prosecutor for the State.

Per Dhirendra Mishra, J

JUDGMENT

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the impugned judgment dated 9-12-2000 passed by the learned Sessions Judge, Bastar in Sessions Trial No.279/1999 by which the learned Sessions Judges after holding the appellant guilty for causing death of deceased Beko Chalki has convicted the appellant under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life.

2. Case of the prosecution in brief is that on 30-4-1999 Beko Kumme (PW-5) in company of Kotwar, Patel & Dulgo reached Police Station Kodenar and gave information to this effect that yesterday at about 6.30 am her

husband Chalki was going to the house of his brother in law Bododi Madia and at that time she was in the home with her son Sonku and other children. After some time her husband Chalki came there shouting that Payko has attacked him by arrow whereupon she saw that an arrow was pierced left side of the stomach. Her husband informed that Payko was hiding behind tamarind tree armed with bow and arrow and shot an arrow towards him. After this she narrated the incident to Madda Lachu and Butlu, who reached there and her husband informed them also that Payko has shot an arrow on him. A panchayat was convened in the afternoon in the village and in the said panchayat also on enquiry Payko admitted that he shot an arrow on Chalki on account of land related dispute. Chalki died on way while he was being taken to Kilepal hospital.

3. On the basis of this information crime No.33/1999 under Section 302 of the Indian Penal Code was registered. The police proceeded for the scene of occurrence for investigation. Inquest over the dead body was prepared in the presence of witnesses vide Ex.P/3. The dead body of Chalki was sent for post mortem to Primary Health Center, Badekilepal vide Ex.P/1-A where Dr. L.L. Jurri (PW-1) conducted the post mortem and submitted his report as per Ex.P/1. Merg intimation (Ex.P/6) was recorded on the basis of information given by the wife of the deceased Beko Kumme (PW-5). During investigation a bamboo made bow and arrow was seized vide Ex.P/4. A blood stained arrow and a pink colour shawl were seized on being produced by Constable Ram

(22)

Nanhan Karoli (Police No.1007) vide Ex.P/9. The seized articles being the blood stained & plain soil, blood stained arrow and pink colour shawl were sent for examination to Primary Health Center, Badekilepal. After examination of the articles the Doctor has submitted his report vide Ex.P/2 and advised to send the articles for chemical examination to detect for human blood. The above seized articles were sent to the Forensic Science Laboratory for chemical examination vide Ex.P/10. After completing the investigation charge sheet was filed in the Court of Judicial Magistrate First Class, Jagdalpur who in turn committed the case to the Court of Sessions Judge for trial.

4. Learned Sessions Judge framed charge under section 302 of the Indian Penal Code. However, the appellant abjured the guilt.

5. The prosecution in order to establish the charge against the appellant has examined 7 witnesses in all. Statement of the accused was also recorded under section 313 of the Code of Criminal Procedure in which he denied the circumstances appearing against him in the prosecution case. Learned trial Court after hearing the Public Prosecutor and the counsel for the appellant held the appellant guilty and convicted & sentenced him as mentioned above.

6. Homicidal death of the deceased Beko Chalki is not in dispute. Even otherwise from perusal of post mortem report (Ex.P/1) submitted by Dr. L.L. Jurri (PW-1) who conducted the post mortem over the dead body of the deceased, it appears that the Doctor noticed a pierced wound on the right

side of the stomach which penetrated from the stomach portion and exited from back. The Doctor opined that the cause of death is haemorrhage and shock due to injuries over mesenteric arteries and the same was homicidal in nature. The homicidal death of deceased Beko Chalki is established. The conviction of the appellant is based on oral dying declaration of the deceased and extra judicial confession made by the appellant.

7. Learned counsel for the appellant submitted that the evidence given by PW-5 Beko Kumme in her Court statement is in complete variance with the case of the prosecution. He further submitted that contrary to the case of the prosecution this witness has stated that her husband had gone towards Patelpara in the night, however, when he did not return in the night she went in search of him in the morning towards Patelpara and on the way she found her husband in unconscious condition with arrow injury, therefore, the alleged oral dying declaration given by the deceased cannot be believed. Learned counsel also submitted that the appellant has been convicted on the basis of extra judicial confession allegedly made by the appellant in the panchayat. However, from the close analysis of the statements of Madvi Koso (PW-2), Madvi Dulgo (PW-3) and Beko Lachhu (PW-6) it would be evident that the alleged extra judicial confession was obtained under duress and the same was not voluntary and therefore, the conviction could not be based on such extra judicial confession.

(24)

8. Learned counsel for the appellant placed reliance upon the decision of Supreme Court rendered in the case of **BALBIR SINGH VS. STATE OF PUNJAB** reported in **1999 SAR (CRIMINAL) 563** and argued that where a dying declaration is doubtful the same cannot be acted and benefit of doubt should be extended to the accused. The evidence of extra judicial confession is considered as piece of evidence. However, in the instant case all the witnesses of extra judicial confession have stated that the appellant was called in the panchayat and there he was slapped by Kamlu, the son of the appellant. Reliance is further placed upon the decision of Maharashtra High Court rendered in the case of **SHYAMRAO VITTHAL POLEMWAR VS. STATE OF MAHARASHTRA** reported in **2002 (3) CRJ 333** and also the decision of Supreme Court rendered in the case of **KANHAI MISHRA @ KANHAIYA MISAR VS. STATE OF BIHAR** reported in **2001 SAR (CRIMINAL) 247**. Learned counsel argued that the conviction based on circumstantial evidence which in several circumstances relied upon by the prosecution should be independently established and on the basis of so established circumstances the involvement of the accused alone in the crime in question should be positively inferred excluding any hypothesis regarding innocence of the accused.

9. On the other hand, learned counsel for the State supported the impugned judgment.

10. We have heard learned counsel for the parties. We have also perused the record of the trial Court and the impugned judgment.

11. Circumstances on the basis of which the conviction is based are :

(i) That immediately after the incident deceased came in the injured condition with an arrow pierced in his chest and stated that the appellant/accused assault him with an arrow due to land related dispute. This was disclosed by the appellant. After some time the deceased died while he was being taken to the hospital for treatment.

(ii) The appellant confessed his guilt in the panchayat before witnesses Madvi Koso (PW-2), Madvi Dulgo (PW-3), Beko Kumme (PW-5) and Beko Lachhu (PW-6).

12. So far as oral dying declaration of the deceased Beko Chalki is concerned, his wife Beko Kumme (PW-5), who lodged the First Information Report on the following day, admit this fact in the First Information Report (Ex.P/5) that her husband came with an arrow pierced in his stomach and stated that Payko had shot an arrow on him; though this witness in the cross-examination has not stated the incident in the similar manner as in the First Information Report. Nevertheless the other witnesses namely Madvi Koso (PW-2) & Madvi Dulgo (PW-3) stated about the incident. They further stated in their depositions that after hearing about the incident they reached the house of the deceased, where they found Chalki in injured condition with an arrow pierced in his chest and he had informed them that the above injury was caused by the appellant. In the light of the deposition of the above witnesses, who are independent witnesses of the village, a discrepancy in the statement of Beko Kumme (PW-5) regarding the consciousness of the

deceased is not material and the same can be ignored. Apart from dying declaration made by the deceased before the above witnesses, there is reliable and cogent evidence regarding extra judicial confession as has come in the statements of Madvi Kosa (PW-2), Madvi Dulgo (PW-3), Beko Kumme (PW-5) and Beko Lachhu (PW-6), all of whom have stated that the appellant came in the panchayat and voluntarily confessed his guilt that he shot an arrow upon the deceased. So far as the argument of the appellant in this regard that in the panchayat the son of the deceased Kamlu had slept the appellant twice is concerned, from the evidence of the above witnesses we find that even before he was slept by Kamlu the appellant has already confessed his guilt voluntarily. Therefore, the decisions cited by learned counsel for the appellant to show that the extra judicial confession should not be acted upon when it is not voluntarily is not applicable in the present set of facts.

13. In the light of the above discussions, we are of the considered opinion that the Court below has not committed any illegality or infirmity in convicting the appellant on the basis of extra judicial confession. The appeal being devoid of substance and the same deserves to be dismissed.

14. Accordingly, the appeal fails and is dismissed.

Sd/-
Fakhruddin
Judge

Sd/-
Dhirendra Mishra
Judge

Gowri